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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

STEPHEN B. HEINTZ, COMMISSIONER OF THE DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JOSEPH I. LIEBERMAN
Attorney General of the
State of Connecticut

ROBERT A. NAGY*
Assistant Attorney General
One Hartford Square West
Suite 202
Hartford, CT 06106-1943
Tel. (203) 566-7014

*Counsel of Record

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528-4254

QUESTION PRESENTED

Whether a statutory lien which secures reimbursement of both prior and subsequent grants of public assistance is choate and superior to a subsequently arising federal tax lien absent either an action seeking foreclosure of the public assistance lien or a judgment against the taxpayer/beneficiary for past assistance rendered?

LIST OF PARTIES

The parties to the proceedings in the Supreme Court of the State of Connecticut were the Petitioner, Stephen B. Heintz, in his capacity as Commissioner of the Connecticut Department of Income Maintenance, and the Respondent, United States Internal Revenue Service.

The Danbury Savings and Loan Association, Inc., as plaintiff, together with Colin and Valerie Delaney, Jack R. Hanna, The Sears, Roebuck and Co., Household Finance Corporation, Associated Neurologists, the Town of Bethel, Connecticut, F.F.S. Service Corporation, Commonwealth Federal Savings Bank and the Money Store/Connecticut, Inc., as defendants, and John Jowdy, Esq., committee for sale, were all parties before the Superior Court for the Danbury Judicial District. These parties did not participate in proceedings before the Supreme Court of the State of Connecticut and are not, therefore, named as parties herein.

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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The Petitioner, Stephen B. Heintz, Commissioner of the Department of Income Maintenance of the State of Connecticut, prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Connecticut entered in this case on June 14, 1988.

OPINIONS BELOW

The decision of the Supreme Court of the State of Connecticut (Appendix pp. 1A–12A, *infra*) is reported at 207 Conn. 743 (1988). The opinion of the Superior Court for the Danbury Judicial District (Appendix pp. 13A–16A, *infra*) is unreported.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Connecticut was entered on June 14, 1988 and its opinion is printed in the Appendix to this Petition at pp. 1A–12A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

This case involves Sections 6321 and 6322 of the Internal Revenue Code and Connecticut General Statutes § 17-82c. The text of these statutes is printed in the Appendix, pursuant to U.S. Supreme Court Rule 21.1(f), at pp. 17A–18A.

STATEMENT OF THE CASE

The underlying action is one initiated by the Danbury Savings and Loan Association, Inc. to foreclose a first mortgage given to it by Colin and Valerie Delaney, the owners of the equity. The State of Connecticut and the United States of America were among several subsequent emcumbrancers named as additional defendants in the action.

The State's interest arises out of grants of public assistance made to Valerie Delaney by the Department of Income Maintenance pursuant to the program of Aid to Families With Dependent Children and its right to be reimbursed in full for

all such payments.[1] To secure its right to reimbursement, the State caused two (2) separate liens to be simultaneously filed on the Bethel land records against the taxpayers' realty because, under state law, the liability of Colin and Valerie Delaney for reimbursement of all assistance was joint and several.[2] The State's liens were filed on the Bethel land records on August 24, 1981.

The interest of the United States arises out of the failure of Colin and Valerie Delaney to pay federal income taxes for the years 1978 and 1982. Based on such failure, the Internal Revenue Service entered assessments against the Delaneys on September 21, 1981 and October 23, 1985, respectively, and caused general tax liens to be filed on the Bethel land records on January 11, 1983 and September 10, 1986, respectively.

On November 24, 1986, the Superior Court for the Danbury Judicial District entered a judgment of foreclosure by sale. The property was sold at public auction and the sale confirmed by the trial court.

Subsequently, the United States moved the trial court to determine the priorities to be accorded to the liens of the State of Connecticut and the Internal Revenue Service. The United States claimed that the State's liens were not entitled to a priority over the federal liens even though the State's liens were actually filed on the local land records before it had entered assessments against the Delaneys. The Government's position was based solely and exclusively on the ground that the State's liens failed one of the three prongs of the so-called "choateness" rule of *United States v. New Britain*, 347 U.S. 81 (1954) wherein the Supreme Court held that a competing lien must not only attach to the property before the federal lien arises but be choate as well for it to enjoy a priority over a subsequently filed general tax lien, and that to be choate

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[1] Conn. Gen. Stat. §§ 17-82c and 17-83e.

[2] Conn. Gen. Stat. § 17-83e.

the competing lien must identify the lienor, the property subject to the lien and be specific in amount. 347 U.S. at 84.

The United States claimed that the State's liens were inchoate solely on grounds that they were not established in amount. It conceded the sufficiency of the State's liens as to identity of the lienor and description of the liened property. Nor did the Government challenge filing of the State's liens on the local land records on August 24, 1981, nearly one (1) month *before* the first of the federal tax assessments.

The State in its trial and appellate briefs and during argument before the Supreme Court of the State of Connecticut took the position that its liens were fixed in amount on the date upon which each federal assessment was entered by virtue of public assistance payments *actually made* as of each such date. Since the State's liens were fixed in amount and attached to the property before the federal liens arose, it was the State's position that priorities should be established as follows:

1. To the State of Connecticut on its lien of August 24, 1981 for public assistance payments actually made to Valerie Delaney between December 18, 1979 and September 21, 1981, the date upon which the first federal assessment was entered.

2. To the United States on its assessment of September 21, 1981, in full.

3. To the State of Connecticut for public assistance payments actually made between September 21, 1981 and October 23, 1985, the date upon which the second federal assessment was entered.

4. To the United States on its assessment of October 23, 1985, in full.

The case of *American Surety Company of New York v. Sundberg*, 58 Wash. 2d 337, 363 P.2d 99 (1961), *cert. den.* 368 U.S. 989 (1962), among other cases, was cited as authority for the State's position.

On July 15, 1987, the trial court held that the State's liens were not entitled to priority over the federal liens. However, in so doing, the trial court relied on a definition for choateness developed in cases arising under the federal insolvency statute, 31 U.S.C. § 3713, absent any claim or proof by the Government that the Delaneys were insolvent. The trial court held that the State's liens were not choate because they had not been reduced to possession.

The State took an appeal to the Appellate Court of the State of Connecticut. The State's appeal was subsequently transferred to the docket of the Supreme Court of the State of Connecticut per local rule.

On June 14, 1988, the Supreme Court of the State of Connecticut found that the trial court had applied the improper test for choateness to the State's liens. Even though the State demonstrated that the amount of the liens could be determined and was ascertainable at *any* point in time,[3] the Supreme Court of the State of Connecticut nevertheless affirmed the judgment of the trial court holding that the State's liens were not sufficiently definite in amount under the *New Britain* standard because the State had not taken any steps to enforce the liens by initiating proceedings to foreclose its liens or to obtain a judgment against the Delaneys for past assistance rendered.

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[3] The State, at various times during the proceedings before the trial court, submitted no less than three (3) affidavits of debt. Each affidavit stated that Valerie Delaney first became eligible for aid on December 18, 1979. The State's first affidavit covered public assistance payments from December 18, 1979 through August 31, 1986. Its second affidavit covered the period December 18, 1979 to March 31, 1987. Its third affidavit covered two (2) periods of time, i.e. from December 18, 1979 to January 10, 1983,

(continued)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT IS IN DIRECT CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *HOARE V. UNITED STATES*, 294 F.2d 823 (9th Cir., 1961).

The general rule for priority of liens where a federal lien is asserted is that for a lien arising under state law to be entitled to a priority over the federal tax lien, the competing lien must be prior in time and "choate" at the time the tax lien arises. *United States v. New Britain, supra; United States v. Security Trust and Savings Bank*, 340 U.S. 47 (1950). In turn, *New Britain* and the numerous subsequent cases reaffirming that decision[4] establish that a lien does not become choate for that purpose until the identity of the lienor, the property subject to the lien and the amount of the lien are fixed and certain.

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[3] *(continued)*
the date upon which the first federal lien was filed, and from January 11, 1983 to September 9, 1986, the date upon which the second federal lien was filed. The State also indicated in its reply brief to the Connecticut Supreme Court that upon remand, an affidavit covering benefits paid from December 18, 1979 to the date upon which the first federal assessment and benefits paid between the first and second federal assessment could and would be filed. These affidavits, covering different periods of time, demonstrate the ascertainability of the amount which the State's liens secured.

[4] *United States v. Acri*, 348 U.S. 211 (1955); *United States v. Liverpool & London Ins. Co.*, 348 U.S. 215 (1955); *United States v. Scovil*, 348 U.S. 218 (1955); *United States v. Colotta*, 350 U.S. 808 (1955); *United States v. White Bear Brewing Co.*, 350 U.S. 1010 (1956); *United States v. Vorreiter*, 355 U.S. 15 (1957); *United States v. Ball Construction Co.*, 355 U.S. 587 (1958); *United States v. Hulley*, 358 U.S. 66 (1958); *Crest Finance Co. v. United States*, 368 U.S. 347 (1961). The decisions also establish that the doctrine of relation back cannot be applied to defeat the priority of federal liens. *United States v. Security Tr. & Sav. Bk.*, 340 U.S. 47 (1950).

The Supreme Court of the State of Connecticut held below that, in advance of foreclosure proceedings or a judgment against the taxpayers for past assistance rendered, the Petitioner's liens were not fixed and certain in amount and therefore not choate under federal law. 207 Conn. at 753 (Appendix pp. 1A–12A). However, definiteness as to amount is not properly determined by the existence or non-existence of proceedings the purpose of which is to enforce the competing lien by reducing it to possession. Nor is any judicial determination required. In so holding to the contrary, the decision of the Supreme Court of the State of Connecticut is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Hoare v. United States,* 294 F.2d 823 (9th Cir., 1961). In an action involving a chattel mortgage to secure performance of a lease,[5] the court therein stated that:

> "The liability to pay delinquent rent arose as soon as the rent became delinquent. At the time of the tax levy the amount then owing was known to or *ascertainable* by the parties. This amount was then subject to collection by foreclosure. Under the circumstances it is immaterial that this amount had not by then been *judicially* determined since the lessors are not seeking status as judgment creditors."

Id. at 827. (emphasis added)

The court previously stated that:

> "With regard to any mortgage the fact that steps have not been taken to foreclose prior to notice of a federal tax lien does not deprive the mortgage of the benefit of § 6323(a)."

Id.

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[5] The court found such a mortgage to be valid under Washington law and a "mortgage" for purposes of § 6323(a) of the Internal Revenue Code. See, p. 11, *infra,* to the effect that under Washington law a mortgage is nothing more than a lien.

Since the Petitioner's liens secured reimbursement of public assistance payments *as they were made* and since the amount of public assistance payments at any point in time is *ascertainable*, i.e. by adding a column of numbers,[6] the absence of proceedings to foreclose the lien or to otherwise secure a judicial determination of the amount due are immaterial, and the ruling of the Supreme Court of the State of Connecticut to the contrary is in conflict with the decision of the Court of Appeals in *Hoare v. United States, supra.*[7]

II. THE DECISION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT IS NOT IN ACCORD WITH *UNITED STATES V. VERMONT,* 337 U.S. 351 (1964).

In *United States v. Vermont, supra,* the United States Supreme Court sought to explain and harmonize its prior decisions as to the proper test of choateness.[8] The Court explained that the choateness test to be applied in any case turned upon the presence or absence of a single factor — the insolvency of the debtor. It held that the obviously stricter "reduced to possession" test of choateness is applicable only where the debtor is shown to be insolvent. Absent such a showing, the choateness test of *United States v. New Britain, supra,* is to be applied.

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[6] See, i.e., fn. 3, *supra.* Accord, *Crest Finance Co., Inc. v. United States,* 291 F.2d (7th Cir., 1961), remanded, 368 U.S. 347 (1961).

[7] *Hoare* has been cited by the United States Supreme Court in such a manner as to indicate the Court's agreement with its reasoning. See *United States v. Pioneer American Insurance Co.,* 374 U.S. 84, 92, fn. 10.

[8] In *United States v. Gilbert Associates, Inc.,* 345 U.S. 361 (1953) the Court held that a competing lien was choate only if it had been reduced to possession. 345 U.S. at 366. In *United States v. New Britain, supra,* the Court held that a lien was choate when the identity of the lienor, the property subject to the lien and the amount of the lien are fixed and certain. 377 U.S. at 84. See also 31 U.S.C. § 3713.

The Supreme Court of the State of Connecticut acknowledged that distinction and held that the trial court improperly applied the stricter "reduced to possession" standard because the Government neither pleaded nor proved insolvency of the debtors at trial. The Supreme Court of the State of Connecticut nevertheless proceeded to apply the very test which it said the trial court could not apply and, in so doing, held the Petitioner's liens to the stricter standard of choateness. Absent a showing of insolvency, a competing lien need not be reduced to possession. The test for choateness under *New Britain, supra*, in no way contemplates initiation of an action to enforce the competing lien. It turns solely on the *ascertainability* of the amount. Nor is a judicial determination of any sort required.

III. THE DECISION OF THE CONNECTICUT SUPREME COURT IS IN DIRECT CONFLICT WITH THE DECISION OF THE WASHINGTON SUPREME COURT ON A QUESTION OF FEDERAL LAW IN *AMERICAN SURETY COMPANY OF NEW YORK V. SUNDBERG*, 58 Wash. 2d 337, 363 P.2d 99 (1961), *cert. den.* 368 U.S. 989 (1962).

This Court has never considered the question of whether a lien which secures future advances may ever be fixed and certain and thereby satisfy the third prong of the *New Britain* rule. However, the Supreme Court of the State of Washington did consider precisely that issue in *American Surety Company of New York v. Sundberg, supra*. The lien at issue in *American Surety* was a mortgage given in consideration of advances presently made "and in consideration of future advances to be made" by the mortgagee. The mortgage was totally open-ended in that it did not limit the amount of future advances.[9] The instrument was filed on the local land records

[9] This fact pattern is virtually identical to the case at bar in that the State's liens were not filed until after Valerie Delaney had been a recipient of aid for approximately twenty-two (22) months and purported to secure both the past payments that had actually been made and such payments as would thereafter be made to her.

in advance of the federal tax lien. The advances which the mortgage purported to secure were made both before and after the date upon which the federal liens were filed.[10] The Supreme Court of the State of Washington held that the mortgage properly secured both present and future advances but that, *under federal law,* the mortgage was fixed and certain (i.e. ascertainable) in amount only to the extent of such advances as had actually been made by the mortgagee as of the date upon which the federal lien was filed. This holding was based on a series of cases arising from across the country, i.e., *United States v. Bond,* 279 F.2d 837 (4th Cir., 1960), *cert. den.* 364 U.S. 895 (1961); *United States v. Christiansen,* 260 F.2d 624 (9th Cir., 1959); *Metropolitan Life Insurance Co. v. United States,* 9 App. Div. 2d 356, 194 N.Y.S. 2d 168 (1959), but particularly in reliance upon the holding of the court in *United States v. Ringler,* 166 F.Supp. 544 (N.D. Ohio, 1958). In *Ringler,* a mortgage in a fixed sum had been given to secure payment for an attorney's legal services to be rendered in the future. The mortgage was recorded before the federal lien arose. The legal services were rendered both before and after the date upon which the federal liens were filed. In an action by the Government to foreclose its tax liens, the court stated the following:

> ". . . However, whenever a question involving the relative priority of United States tax liens and other liens arises, courts are required to apply the test of choateness to the competing liens. Applying that test here, it must be held that as to the indefinite future

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[10]Section 6323 of the Internal Revenue Code provides that where the competing lien is a mortgage or another lien as listed in that section, its priority vis-a-vis the federal lien is determined by comparing the date upon which the two liens were actually filed. Where the competing lien is not one of those enumerated in § 6323, its priority vis-a-vis the federal lien is determined by comparing the date of its filing with the date upon which the federal assessment was entered. The State's liens herein are not among those enumerated in § 6323. I.R.C. § 6322. However, they were filed before either of the two (2) federal tax assessments were entered so that they are clearly prior in time.

advances (in the form of legal services) which were to be made after August 5, 1953, the mortgage lien is subordinate to the tax lien of the United States. The lien of the mortgage securing the value of services rendered between June 18, 1953 and August 5, 1953, stands on a different footing. As shown by the record, on August 5, 1953, legal services of the value of $1,600 had been rendered by the mortgagees in reliance upon the security of the mortgage. To that extent, therefore, the mortgage lien was not inchoate or imperfect. I am of the opinion that as to the amount of the mortgage lien securing such indebtedness the rule of first in time — first in right, applies . . . ."

166 F.Supp. at 548.

In its memorandum in opposition to the petition for writ of certiorari filed in *American Surety*, the Government stated its *complete and total agreement* with the holding of the Supreme Court of the State of Washington stating:

> "The court below correctly applied well-established principles in holding that the surety's mortgage liens on the King County projects became choate only after the advances secured by the mortgages were made since only then was the lien fixed in amount. *United States v. Ball Construction Co.*, 355 U.S. 587; *United States v. Security Tr. & Sav. Bk.*, 340 U.S. 47."

Memorandum of the United States on Petition for Writ of Certiorari at 7, *American Surety Co. of New York v. Sundberg, supra.*

It is also to be noted that the Government further stated therein that ". . . it is settled Washington law that a mortgage is merely a lien for the payment of money . . ." *Id.* at 8. This concession renders the State's liens herein, wholly indistinguishable from the lien before the court in *American*

Surety. The decision of the Supreme Court of the State of Connecticut is clearly in conflict with the decision of the Washington Supreme Court[11] on an important question of federal law bearing on the efforts of the federal government to collect its taxes and the efforts of the state government to secure reimbursement of public assistance payments made by it pursuant to the program of Aid to Families with Dependent Children.

CONCLUSION

The petition for writ of certiorari should be granted to resolve a conflict between the decision of the highest court of the State of Connecticut and the Court of Appeals for the Ninth Circuit and the highest court of the State of Washington on an important federal question involving interpretation of the rules governing the priority of federal tax liens established by this Court and as to which rules the Government has taken inconsistent, contradictory positions.

Respectfully submitted,

JOSEPH I. LIEBERMAN
Attorney General for the
State of Connecticut

ROBERT A. NAGY*
Assistant Attorney General
One Hartford Square West
Suite 202
Hartford, CT 06106-1943
Tel. (203) 566-7014

*Counsel of Record

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[11] *American Surety* has been cited by the United States Supreme Court in such a manner as to indicate the Court's agreement with its reasoning. See *United States v. Pioneer American Insurance Co.*, 374 U.S. 84, 93 fn. 10.

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APPENDIX

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OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT 1A

OPINION OF THE SUPERIOR COURT FOR THE DANBURY JUDICIAL DISTRICT 13A

TEXT OF STATUTORY PROVISIONS INVOLVED 17A

DANBURY SAVINGS AND LOAN ASSOCIATION, INC. *v.* COLIN M. DELANEY ET AL.
(13229)

PETERS, C. J., CALLAHAN, GLASS, COVELLO and HULL, Js.

Argued May 5—decision released June 14, 1988

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial District of Danbury and tried to the court, *Geen, J.*; judgment of foreclosure by sale; thereafter, the defendant United States of America filed a motion to determine the priorities of certain federal and state liens on the property; the court, *Moraghan, J.*, entered an order giving the federal liens priority over the state liens, and the state appealed. *No error.*

Robert A. Nagy, assistant attorney general, with whom, on the brief, was *Joseph I. Lieberman*, attorney general, for the appellant (state).

Michael J. Roach, pro hac vice, with whom were *John B. Hughes*, assistant United States attorney, *Lauren McCurry*, special assistant United States attorney, and, on the brief, *William S. Rose, Jr.*, assistant United States attorney general, *Stanley A. Twardy, Jr.*, United States attorney for the District of Connecticut, and *Gary R. Allen* and *William S. Estabrook*, for the appellee (defendant United States of America).

PETERS, C. J. The commissioner of income maintenance has authority, under General Statutes § 17-82c,[1]

[1] "[General Statutes] Sec. 17-82c. ELIGIBILITY OF PERSON HAVING INTEREST IN REAL PROPERTY. LIEN OF STATE. No person shall be deemed ineligible

to record a lien on the real property of a recipient of state public assistance grants. The sole issue in this appeal is when such a lien becomes sufficiently choate to give it priority over a competing federal tax lien. This case began as an action by the plaintiff, Danbury Savings and Loan Association, Inc., to foreclose a mortgage lien on real property owned by the defendants Colin M. Delaney and Valerie E. Delaney. In this foreclosure action, numerous other lienholders, including the United States and the state of Connecticut, were named as parties defendant. The trial court, *Lavery, J.*, approved a foreclosure by sale to Jack R. Hanna for $141,000. Thereafter, the United States filed a motion

to receive an award under this chapter for himself or for any person for whose support he is liable by reason of having an interest in real property, maintained as his home, provided the equity in such property shall not exceed the limits established by the commissioner. The commissioner may place a lien against any property to secure the claim of the state for all amounts which it has paid or may thereafter pay to him or in his behalf under the provisions of this chapter, except for property maintained as a home in aid to families of dependent children cases, in which case such lien shall secure the state only for that portion of the assistance grant awarded for amortization of a mortgage or other encumbrance beginning with the fifth month after the original grant for principal payment on any such encumbrance is made, and each succeeding month of such grant thereafter. The claim of the state shall be secured by filing a certificate in the land records of the town or towns in which any such real estate is situated, describing such real estate. Any such lien may, at any time during which the amount by it secured remains unpaid, be foreclosed in an action brought in a court of competent jurisdiction by the commissioner on behalf of the state. Any real estate to which title has been taken by foreclosure under this section, or which has been conveyed to the state in lieu of foreclosure, may be sold, transferred or conveyed for the state by the commissioner with the approval of the attorney general, and the commissioner may, in the name of the state, execute deeds for such purpose. Such lien shall be released by the commissioner upon payment of the amount by it secured, or an amount equal to the value of the beneficiary's interest in such property if the value of such interest is less than the amount secured by such lien, at his discretion, and with the advice and consent of the attorney general, upon a compromise of the amount due to the state. At the discretion of the commissioner the beneficiary, or, in the case of husband and wife living together, the survivor of them, so long as he or she lives, or a dependent child or children, may be permitted to occupy such real property."

for a determination of priorities, claiming that its status as a holder of federal tax liens entitled it to reimbursement from the foreclosure sale proceeds in advance of reimbursement to the state as a holder of public assistance liens. The state has appealed from a judgment of the trial court, *Moraghan, J.*, assigning first priority to the federal tax liens. We find no error.

The underlying facts are not at issue. The liens of the United States arise out of liabilities of Colin M. Delaney and Valerie E. Delaney for arrearages in federal income taxes for the taxable years 1978 and 1982, together with interest, penalties and lien fees. Pursuant to I.R.C. §§ 6321 and 6322,[2] the United States assessed the 1978 arrearage on September 21, 1981, and the 1982 arrearage on October 23, 1985. These arrearages automatically imposed liens on all of the taxpayers' property. I.R.C. §§ 6321, 6322. Notices of these liens were filed, pursuant to I.R.C. § 6323,[3] on January 11, 1983, with regard to the 1978 deficiency and on September 10, 1986, with regard to the 1982 deficiency. In an affidavit of debt filed in the present proceedings on March 31, 1987, the United States asserted that its federal tax liens then totalled $34,410.51.

[2] "[I.R.C.] § 6321. LIEN FOR TAXES. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

"[I.R.C.] § 6322. PERIOD OF LIEN. Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or become unenforceable by reason of lapse of time."

[3] I.R.C. § 6323 provides in relevant part: "VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS. (a) PURCHASE[R]S, HOLDERS OF SECURITY INTERESTS, MECHANIC'S LIENORS, AND JUDGMENT LIEN CREDITORS. The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lienor credi-

The liens of the state of Connecticut arise out of grants of public assistance to Valerie Delaney by the department of income maintenance pursuant to the program of aid to families with dependent children. In an affidavit of debt filed herein on May 20, 1987, the state asserted that such assistance payments had begun on December 18, 1979, and continued through September 9, 1986, in a total amount of $60,248.38. To secure reimbursement of these grants, the state, on August 24, 1981, pursuant to General Statutes § 17-82c, recorded separate certificates of lien against the interests of Valerie Delaney and Colin Delaney in the land records of the town of Bethel where their real property was located.

The trial court ruled that the federal liens should be given priority even though they postdated the filing of the state's certificates of lien. The court noted that, under applicable precepts of federal law embodied in I.R.C. §§ 6321 and 6322, a federal lien ordinarily takes its place in the priority race at the time when the federal tax is assessed, while a state lien only receives such standing when it has become specific, perfected and choate.[4] *United States* v. *Equitable Life Assurance Society of the United States,* 384 U.S. 323, 327–28, 86 S.

tor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

(b) PROTECTION FOR CERTAIN INTERESTS EVEN THOUGH NOTICE FILED. . . .

(c) PROTECTION FOR CERTAIN COMMERCIAL TRANSACTIONS FINANCING AGREEMENTS, ETC. . . .

(d) 45-DAY PERIOD FOR MAKING DISBURSEMENTS. . . .

(e) PRIORITY OF INTEREST AND EXPENSES. . . .

(f) PLACE FOR FILING NOTICE; FORM. . . ."

[4] The state, in its reply brief, has acknowledged that its original appellate brief incorrectly assumed that federal liens take no priority over state statutory liens until notice of the federal tax liens is filed. Because the state does not qualify as a purchaser, a holder of a security interest, a mechanic's lienor, or a judgment lien creditor under I.R.C. § 6323 (a), the priority of the state's liens is measured, in accordance with I.R.C. § 6322, from the date of the assessment of the federal taxes.

Ct. 1561, 16 L. Ed. 2d 593 (1966); *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 87, 83 S. Ct. 1651, 10 L. Ed. 2d 770 (1963); *United States* v. *New Britain*, 347 U.S. 81, 85–86, 74 S. Ct. 367, 98 L. Ed. 520 (1954). It held that the state's liens in this case could not meet this test because they had not been reduced to possession before the attachment of the federal liens. In arriving at this conclusion, the court relied on definitions of choateness that have been developed in cases arising under 31 U.S.C. § 3713.[5] See, e.g., *United States* v. *Gilbert Associates*, 345 U.S. 361, 366, 73 S. Ct. 701, 97 L. Ed. 1071 (1953). Although we disagree with the court's reliance on the insolvency statute, we nonetheless concur in its judgment that the federal tax liens were entitled to priority because the state liens were still inchoate on October 23, 1985.

I

The state maintains, in its first claim of error, that the trial court erred in importing into this litigation, brought under the federal tax lien statutes, the priority standards that govern cases brought under the federal insolvency statute, 31 U.S.C. § 3713. The state makes three arguments: (1) the insolvency statute was not pleaded at trial; (2) no evidence of insolvency was introduced at trial; and (3) the test for determining the choateness of a competing lien is more stringent under 31 U.S.C. § 3713 than it is under the federal tax lien statutes. We agree.

[5] This statute, which is often referred to as § 3466 of the Revised Statutes (1875), governs federal claims against insolvent debtors. Recently recodified as 31 U.S.C. § 3713 (a), it provides: "PRIORITY OF GOVERNMENT CLAIMS. (a) (1) A claim of the United States Government shall be paid first when—(A) a person indebted to the Government is insolvent and—(i) the debtor without enough property to pay all debts makes a voluntary assignment of property; (ii) property of the debtor, if absent, is attached; or (iii) an act of bankruptcy is committed; or (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor. (2) This subsection does not apply to a case under title 11."

Although there is much to be said in favor of all three of these assertions, the first two are clearly correct and their resolution is dispositive of this issue. The absence at trial of pleading or proof with respect to any claim of insolvency cannot be remedied on appeal. The United States concedes that its trial memorandum in support of its motion for determination of priorities nowhere invoked the federal insolvency statute. Cf. Practice Book § 109A; *Orticelli* v. *Powers,* 197 Conn. 9, 14–15, 495 A.2d 1023 (1985); *Leone* v. *Knighton,* 196 Conn. 494, 495–98, 493 A.2d 887 (1985). The United States relies nonetheless on two facts dispersed throughout these foreclosure proceedings: Valerie Delaney's long history of receiving public assistance payments; and her filing of a petition in bankruptcy while the foreclosure was pending. We are unpersuaded. Although insolvency may be determined without a formal adjudication of bankruptcy, such a determination always requires a finding of fact based on a proper evidentiary foundation. *Community Progress, Inc.* v. *White,* 187 Conn. 128, 135–36, 444 A.2d 1369 (1982). In this case, the state has not been afforded an opportunity to present evidence, or indeed to make argument, that would inform a trier of fact about the validity of the inference of insolvency that the United States finds so compelling.[6] The trial court therefore erred in determining the choateness of the state's liens in accordance with the priority rules developed pursuant to the federal insolvency statute.

II

The state further maintains that the trial court could not have found that its liens were inchoate if the trial court had properly employed the test for choateness

[6] To invoke 31 U.S.C. § 3713 (a), the United States would have had to prove not only that the taxpayers were insolvent but also that while insolvent, they made a voluntary assignment of property, their property was attached or they committed an act of bankruptcy.

that pertains to priority contests between federal tax liens and state statutory liens. A state statutory lien is choate, under federal law, when it is specific and perfected so that "there is nothing more to be done" to establish the identity of the lienor, the property subject to the lien, and the amount of the lien. *United States* v. *Equitable Life Assurance Society of the United States,* supra. Choateness does not require enforcement of a local tax lien by seizure or sale unless local law itself incorporates a requirement of further judicial proceedings to effectuate the lien. *United States* v. *Vermont,* 377 U.S. 351, 358–59, 84 S. Ct. 1267, 12 L. Ed. 2d 370 (1964); *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47, 50, 71 S. Ct. 111, 95 L. Ed. 53 (1950). We disagree with the state that its liens can pass this test.

In this case, the state's recordation, on August 24, 1981, of certificates of lien under § 17-82c clearly fulfilled some of the requirements for a choate state statutory lien. The certificates identified each lienor by name and described with specificity the property subject to the state's lien. The certificates were, however, entirely open-ended with regard to the amount of the secured indebtedness, which, without any dollar amount, was described only as "assistance payments heretofore or hereafter made to or in behalf of the said Valerie Delaney and said dependent child or children." No supplemental recordations ever detailed the amounts of the secured indebtedness. Even in the priority proceedings herein, the state's affidavit of debt did not allocate assistance payments to periods predating either its filings or the federal tax lien filings. To this date, therefore, the record does not reveal the precise amount of the state's liens that antedate those of the United States. Furthermore, the record indicates that, prior to the mortgage foreclosure proceedings initiated by the named plaintiff, the state had taken no steps to foreclose its liens, a process that, under the express

terms of § 17-82c would have required the commissioner of income maintenance to bring "an action . . . in a court of competent jurisdiction." The question that we must answer is whether under these circumstances the state has established that, when the federal tax liens arose, it had liens for which, under federal law, "there is nothing more to be done."

The United States would have us answer this question "No." It maintains that the amount of the state's liens could not be determined unless and until the commissioner of income maintenance obtained a judgment in a specific amount and an order directing foreclosure. Until that time, it argues, the state's liens were contingent as a matter of state law and therefore inchoate as a matter of federal law.

The state maintains, to the contrary, that its liens had become fully matured and certain as to amount before the effective date of the federal tax liens. This claim has two aspects: the state's liens were fully perfected upon filing, because § 17-82c so provides, and they secured the state's rights to reimbursement in an amount measured by grants of public assistance to or for the benefit of each of the Delaneys up to the date of each of the federal assessments. The state comes close to conceding that the liens may have been inchoate in amount when filed but contends that they matured into specificity thereafter by virtue of each unreimbursed public assistance payment. The state invokes analogous concepts in the law of consensual security arrangements, in which a real property mortgage or a commercial security interest may secure future advances as well as contemporaneous or past indebtedness.

We need not decide today whether federal law would permit state statutory liens to include state claims for reimbursement that were uncertain in amount at the

time of their recordation. The United States Supreme Court has characterized as inchoate an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer-debtor. *United States* v. *Pioneer American Ins. Co.*, supra, 91; *United States* v. *Ball Construction Co.*, 355 U.S. 587, 587–88, 78 S. Ct. 442, 2 L. Ed. 2d 510 (per curiam), reh. denied, 356 U.S. 934, 78 S. Ct. 770, 2 L. Ed. 2d 763 (1958); see 2 G. Gilmore, Security Interests in Personal Property (1965) pp. 1068–70; W. Plumb, Federal Tax Liens (3d Ed. 1972) pp. 87–90; F. Kennedy, "From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien," 50 Iowa L. Rev. 724, 734–35 (1965). In *United States* v. *Pioneer American Ins. Co.*, supra, 89, the United States Supreme Court also stated that it understood the Congress to have intended the same rule of choateness to apply to "the whole spectrum of state-created liens," whether consensual or statutory in origin. Thereafter, the Federal Tax Lien Act of 1966 included provisions that specifically validate various liens in competition with the federal tax lien in precise terms that distinguish sharply between consensual mortgages and state statutory liens.[7] Those distinctions cast considerable doubt upon continued Congressional acquiescence in the analogy upon which the state would have us rely. Under I.R.C. § 6323 (d),[8] special priority for future advances is confined to advances made in connection with a consensual security interest. Neither the Federal Tax Lien Act nor the Supreme Court of

[7] Despite the filing of notice of a federal tax lien, a priority over such a federal lien is given to specially defined real property and special assessment taxes by I.R.C. § 6323 (b) (6) and to certain commercial transactions financing agreements by I.R.C. § 6323 (c). The state's liens do not qualify under either of these provisions.

[8] I.R.C. § 6323 (d) provides: "45-DAY PERIOD FOR MAKING DISBURSEMENTS. Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before

the United States has specifically considered whether an inchoate statutory lien for future advances is rendered partially choate by unfiled advances actually made to the taxpayer-debtor prior to the attachment of the federal tax lien.

That difficult question need not be decided because § 17-82c itself incorporates conditions on the state's right to pursue its statutory lien. The state's lien does not encompass an automatic right to seize the debtor's property once unreimbursed public assistance grants have accrued. The statute contemplates that recipients of public assistance may, despite their default, continue to occupy their homes. Although the statute does not spell out the circumstances under which such continued occupancy will no longer be countenanced, we have indicated, in interpreting related provisions in General Statutes § 17-83e, that the state has no power to enforce its rights to reimbursement through summary seizures "giving rise to possible due process deprivations." *Thibeault* v. *White*, 168 Conn. 112, 118, 358 A.2d 358 (1975). Undoubtedly these concerns prompted the legislature to make explicit, in § 17-82c, that "[a]ny such lien may, at any time during which the amount by it secured remains unpaid, be foreclosed in an action brought in a court of competent jurisdiction by the commissioner [of income maintenance] on behalf of the state." Such a foreclosure action, far from being a ministerial act, invokes the equitable exercise of judicial discretion. *Hamm* v. *Taylor*, 180 Conn. 491, 497, 429 A.2d 946 (1980).

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the 46th day after the date of tax lien filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest—(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing, and (2) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation."

For federal tax lien purposes, the significance of the requirement of a judicial foreclosure action in § 17-82c is that, prior to its completion, it cannot be said that "there is nothing more to be done." This case is therefore similar to *State* v. *Bucchieri,* 176 Conn. 339, 351–52, 407 A.2d 990 (1978), in which we concluded that state forfeiture of contraband pursuant to General Statutes § 54-33g did not give the state a choate lien "when the section itself provides for a hearing at which competing claims may be heard and at which forfeiture is to be adjudicated." Id., 351. We held that such a lien resembles an attachment lien which, according to federal law, is inchoate until the time of judgment, and can be defeated by an intervening recorded federal tax lien. *United States* v. *Security Trust & Savings Bank,* supra, 50. Our conclusion found further support in *United States* v. *Vermont,* supra, 358–59, in which the United States Supreme Court expressly held Vermont's tax lien to be choate once assessed because, under Vermont law, the assessment was immediately given the force of a judgment that could be summarily enforced.[9]

We therefore agree with the United States that the filing of the state's liens pursuant to § 17-82c did not create liens that were, in advance of foreclosure proceedings, choate as a matter of federal law. Such liens amounted to no more than " '*a lis pendens* notice that a right to perfect a lien exists.' " *United States* v. *Vermont,* supra, 355, quoting *United States* v. *Security Trust & Savings Bank,* supra. Because the state's liens were still inchoate according to federal law at the time

[9] *United States* v. *Vermont* is particularly instructive because the court pointedly distinguished between the test for a choate lien under the federal tax lien statute and the test for a lien that would be valid under the federal insolvency statute. The lien in *United States* v. *Vermont* was choate under the former test. *United States* v. *Vermont,* 377 U.S. 351, 357–59, 84 S. Ct. 1267, 12 L. Ed. 2d 370 (1964).

when the federal tax liens arose, the federal liens were entitled to priority in this case.

There is no error.

In this opinion the other justices concurred.

NO. 28 65 72

DANBURY SAVINGS & LOAN ASSOCIATION, INC.	SUPERIOR COURT
V.	JUDICIAL DISTRICT OF DANBURY
COLIN M. DELANEY, ET AL.	JULY 15, 1987

MEMORANDUM OF DECISION

This proceeding is a foreclosure action wherein a judgment foreclosure by sale of property owned by Colin and Valerie Delaney was entered on November 24, 1986. A committee was appointed to sell the property on February 7, 1987, and the property was sold with the proceeds totaling one hundred forty-one thousand ($141,000.00) dollars. The United States, through its Internal Revenue Service (I.R.S.), has moved this court to determine the priorities of distribution between the competing liens of the I.R.S. and the State of Connecticut.

The state interest arises out of public assistance liens recorded on August 24, 1981. On November 24, 1986, the state filed its first affidavit of debt which states that Valerie Delaney received public assistance in the amount of fifty-nine thousand four hundred seventy-three dollars and thirty-eight ($59,473.38) cents. A second affidavit of debt was subsequently filed listing the amount of assistance provided as sixty-nine thousand eight hundred seventy-three dollars and thirty ($69,873.30) cents.

The United States has two federal tax liens listed in its affidavit of debt filed on April 8, 1987. The first was assessed on September 21, 1981 and recorded on January 11, 1983 in the amount of one thousand nine hundred sixty dollars and eighty-four ($1,960.84) cents. The second was assessed on October 23, 1985 and recorded on September 10, 1986 in the

amount of thirty-two thousand four hundred forty-nine dollars and sixty-seven ($32,449.67) cents.

The chronology of those liens is:

1. State lien recorded on August 24, 1981.

2. First federal lien assessed on September 21, 1981.

3. Second federal lien assessed on October 23, 1985.

The United States asserts that the state liens do not take priority over the subsequent federal liens because they fail the three prong "choateness" test of *United States v. New Britain*, 347 U.S. 81 in that they are not specific as to amount. The state urges this court to follow the traditional rule of "first in time, first in right."

Generally, the fundamental principle governing priority is that "the first in time is the first in right." *United States v. New Britain*, 347 U.S. 81, 85; *Carmody v. Peck*, 40 Conn. Sup. 484, 490. With respect to the priority of debts due the federal government, however, this general precept is subject to significant qualification. Government tax liens under 26 U.S.C., Secs. 6321 and 6322 are "general" tax liens which arise when assessed and continue until the tax liability is satisfied or becomes unenforceable. *Carmody v. Peck*, supra, 491. State tax liens, although filed prior in time, remain inferior until they become specific, perfected or choate. *United States v. Equitable Life*, 384 U.S. 323, 327; *State v. Bucchieri*, 176 Conn. 339, 346–47; *Carmody v. Peck*, supra.

In the instant matter, the state liens are clearly prior in time to the federal liens. However, the determination of when a state lien has become specifically "choate" to defeat later federal tax liens is a matter of federal not state law. *State v. Bucchieri*, supra. The *United States v. New Britain* priority rule applies only to competing *choate* liens. To be a "choate," a state lien must be definite in three respects: (1) the identity of

the lienor; (2) the property subject to the lien; and, (3) the amount of the lien. *United States v. New Britain*, supra, 87; *Carmody v. Peck*, supra, 493.

The United States concedes, as indeed it must, that the state has met the first two prongs of the choateness test. However, it asserts that the state liens are not specific as to amount and are not therefore choate.[1]

The liens of the United States are described in 26 U.S.C, Sec. 6321:

> **Lien for taxes.**
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C., Sec. 6322 states:

> **Period of lien.**
> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

The liens are thus effective upon the dates of their assessment: September 21, 1981 and October 23, 1985 (although they were not recorded until January 11, 1983 and September 10, 1986,

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[1] See State's Affidavit of Debt dated November 24, 1986 and March 24, 1987.

respectively). The Sec. 6321 lien is a general lien covering *all* debts owed to the United States. 26 U.S.C., Sec. 6321.

A state lien is not "specific" until it is reduced to possession. *United States v. Gilbert Associates,* 345 U.S. 361, 366; *Carmody v. Peck,* supra, 494. See 31 U.S.C., Sec. 3713; *Community Progress, Inc. v. White,* 187 Conn. 128, 133–34. The state liens herein were never reduced to possession and were never specific for the purposes of defeating the federal lien's priority. See *Carmody v. Peck,* supra, 494–95. The United States liens are therefore entitled to priority. An order may enter in accordance herewith.

/s/ Moraghan

Moraghan, J.

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26 U.S.C. § 6321 provides as follows:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6322 provides as follows:

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

Conn. Gen. Stat. § 17-82c provides as follows:

No person shall be deemed ineligible to receive an award under this chapter for himself or for any person for whose support he is liable by reason of having an interest in real property, maintained as his home, provided the equity in such property shall not exceed the limits established by the commissioner. The commissioner may place a lien against any property to secure the claim of the state for all amounts which it has paid or may thereafter pay to him or in his behalf under the provisions of this chapter, except for property maintained as a home in aid to families of dependent children cases, in which case such lien shall secure the state only for that portion of the assistance grant awarded for amortization of a mortgage or other encumbrance beginning with the fifth month after the original grant for principal payment on any such encumbrance is made, and each succeeding month of such grant thereafter. The claim of the state shall be secured by filing a certificate in

the land records of the town or towns in which any such real estate is situated, describing such real estate. Any such lien may, at any time during which the amount by it secured remains unpaid, be foreclosed in an action brought in a court of competent jurisdiction by the commissioner on behalf of the state. Any real estate to which title has been taken by foreclosure under this section, or which has been conveyed to the state in lieu of foreclosure, may be sold, transferred or conveyed for the state by the commissioner with the approval of the attorney general, and the commissioner may, in the name of the state, execute deeds for such purpose. Such lien shall be released by the commissioner upon payment of the amount by it secured, or an amount equal to the value of the beneficiary's interest in such property if the value of such interest is less than the amount secured by such lien, at his discretion, and with the advice and consent of the attorney general, upon a compromise of the amount due to the state. At the discretion of the commissioner the beneficiary, or, in the case of husband and wife living together, the survivor of them, so long as he or she lives, or a dependent child or children, may be permitted to occupy such real property.